

1 11 USC § 523(a)(2)(A)
2 11 USC § 523(a)(6)
3 Fraud
4 Collateral Estoppel
5 ORS 59.115(2)(a)
6 ORS 59.115(1)(a) & (b)
7 ORS 59.135

8 Fabia v. Clibborn Adv. # 96-6153-aer
9 In Re Clibborn Main Case # 696-60747-aer7
10 Fabia v. Overholser Adv. # 96-3307-psh/aer
11 In Re Overholser Main Case # 396-31252-psh7
12 10/14/99 Radcliffe Unpublished*

13 Default had been entered prepetition against the debtors in
14 state court litigation as a sanction for failing to appear at a
15 deposition. A separate damages hearing was held. After debtors filed
16 Chapter 7 petitions, limited relief from stay was granted to
17 complete the state court litigation. Judgment was entered against
18 debtors on common law and statutory fraud claims, and affirmed on
19 appeal. The judgment awarded compensatory and punitive damages, as
20 well as attorney fees and costs.

21 The judgment creditors sought exception to discharge of the
22 judgment under §§ 523(a)(2)(A) & (6), and moved for summary judgment
23 based on the judgment's collateral estoppel effect.

24 In a separate adversary proceeding, one of the debtors entered
25 into a settlement with the Chapter 7 trustee and the judgment
26 creditors, among others, allowing a defined amount of proceeds (from
the sale of real property) to be paid to the judgment creditors to
satisfy any claim they had against the estate. The settlement was
expressly without prejudice to the judgment creditors prosecuting
their state court and § 523 claims.

27 The judgment creditors were paid the proceeds from the
28 settlement. The Ch. 7 trustee then objected to their claim,
29 recommending reduction to the amount paid per the settlement. The
30 judgment creditors did not request a hearing, so the objection was
31 sustained through a self-executing order. Debtor then argued in his
32 own motion for summary judgment that the effect of this order was to
33 satisfy the creditors' claims against the debtor, thus mooting the §
523 litigation.

34 Held: Creditors' Motion Granted; Debtor's Motion Denied.

35 Under 9th Circuit authority, the collateral estoppel effect of a
36 state court judgment in bankruptcy court is determined by the law of
the rendering state. Under Oregon law, default judgments are
entitled to preclusive effect. Common law fraud in Oregon mimics the
elements of § 523(a)(2)(A). The award of punitive damages plus the
allegations of the state court complaint (deemed true in a default

1 situation) were also sufficient to establish a § 523(a)(6) claim.
2 Under U.S. Supreme Court precedent, the entire state court judgment
3 including the attorney fees and punitive damages awarded therein,
was excepted from discharge. However, creditors were denied their
attorney fees for litigating dischargeability issues.

4 A fair interpretation of the self-executing claims order
5 incorporated the settlement in the adversary proceeding, which
6 expressly was without prejudice to creditors maintaining the action
at bar.

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9 *On occasion the Court will decide to publish an opinion
10 after its initial entry (and after submission of this summary).
Please check for possible publication in WESTLAW, West's Bankruptcy
Reporter, etc.

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13 **E99-21 (15)**
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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:)	Bankruptcy Case No.
)	696-60747-aer7
RONALD G. CLIBBORN and)	
CHRISTINE ANN CLIBBORN,)	
_____ Debtor.)	
ROMEO & NIKA FABIA,)	Adversary Proceeding
)	No. 96-6153-aer
Plaintiff,)	
v.)	
RONALD G. CLIBBORN,)	
_____ Defendant.)	
DUANE J. OVERHOLSER,)	Bankruptcy Case No.
_____ Debtor.)	396-31252-psh7
ROMEO & NIKA FABIA,)	Adversary Proceeding
Plaintiff,)	No. 96-3307-psh/aer
v.)	
DUANE J. OVERHOLSER,)	MEMORANDUM OPINION
_____ Defendant.)	

1 Before this court are cross motions for summary judgment in
2 Adversary Proceeding # 96-6153-aer, and Plaintiffs' motion for
3 summary judgment in Adversary Proceeding # 96-3307-aer. These two
4 adversaries (filed in separate main cases) have identical
5 Plaintiffs, overlapping facts and legal theories. Accordingly, the
6 above-referenced motions are hereby resolved in one opinion.

7 **Background**

8 Plaintiffs filed identical complaints (later amended) in both
9 adversaries seeking to have a default judgment entered in Yamhill
10 County Circuit Court (the state court) excepted from discharge under
11 §§ 523(a)(2)(A) and (a)(6).¹

12 Plaintiffs moved for summary judgment in both cases.
13 Defendant Ronald Clibborn (Clibborn) filed a cross motion for
14 partial summary judgment on the issues of punitive damages and
15 attorney fees.

16 This Court heard oral argument on the motions. Limited
17 relief from stay was granted to allow the parties to complete
18 litigation pending in the state court. The motions were held in
19 abeyance pending that completion.

20 After the state court litigation was completed, this Court
21 convened a status conference on the present motions. A briefing
22 schedule was established. The briefs, as well as supplemental
23 concise statements have been submitted. The motions are now ripe
24 for decision.

25 ¹ Unless otherwise noted, all statutory references are to Title
26 11 of the United States Code.

Clibborn has also filed a second motion for summary judgment. Plaintiffs have responded thereto. Neither party has requested oral argument so that motion is also ripe.

Facts

Based upon the parties' submissions, I find the following material facts:

In September, 1994, Plaintiffs sued Defendants in the state court for common law fraud, failure to register a security under ORS 59.115(1)(a) and deceit in selling a security under ORS 59.115(1)(b) and 59.135.

In substance, the state court complaint alleged that Defendants fraudulently induced Plaintiffs to invest or loan \$50,000.00, by representing the investment or loan was secured by valuable historic German bearer bonds. In the state court complaint, Plaintiffs prayed for \$50,000.00 in damages, plus prejudgment interest, costs and attorney fees, and \$250,000.00 in punitive damages.

Defendants failed to appear for depositions which were scheduled for late June, 1995. Plaintiffs requested sanctions. They also sought \$500.00 in attorney fees.

On August 7, 1995, a hearing was held on the Plaintiffs' motion for sanctions. The state court, in its oral ruling, entered a default, and ordered a further hearing on damages.

After a damages hearing was held, the state court entered a default judgment on August 15, 1995 for \$314,677.67 plus post

1 judgment interest (at 9% from August 15, 1995 until paid), broken
2 down as follows:

- 3 a) \$ 50,000.00 principal;
- 4 b) \$ 11,328.12 prejudgment interest;
- 5 c) \$250,000.00 punitive damages;
- 6 d) \$ 3,122.50 attorney fees (including the
\$500.00 sanction noted above) and
- 7 e) \$ 227.00 costs

8 In late August, 1995, Defendants moved to set aside the
9 judgment under ORCP 71 B(1). On October 25, 1995, the punitive
10 damages and attorney fees portion of the judgment were set aside.
11 The state court ordered the matter set for a further damages
12 hearing.

13 On February 20, 1996, the reset damages hearing was held. At
14 that hearing the state court announced orally that because of the
15 sanctions motions and consequent default, there had already been a
16 finding that Defendants defrauded the Plaintiffs, as such,
17 \$250,000.00 in punitive damages plus attorney fees were awarded.
18 The court instructed Plaintiff's counsel to submit a new form of
19 judgment.

20 Defendants each filed Chapter 7 petitions on February 27,
21 1996, before the new judgment could be entered. After limited relief
22 from stay was granted, the state court, on April 4, 1997, re-entered
23 another judgment, identical to the August 15, 1995 judgment
24 referenced above.

25 Defendants appealed, the Oregon Court of Appeals, on August
26 5, 1998, affirmed without opinion. Supreme Court review was not
sought. The state court judgment is now final.

1 In the meantime, on May 28, 1996, Plaintiffs filed a proof of
2 claim in Clibborn's Chapter 7 case, for \$329,886.65 unsecured (based
3 on the judgment) and \$1.00 secured (the alleged value of the German
4 bearer bonds).

5 In February, 1997, Clibborn's Chapter 7 trustee, Ronald
6 Sticka (the trustee), obtained a court order to sell Clibborn's
7 residence free and clear of liens, with the liens to attach to the
8 proceeds.

9 In May, 1997, the trustee filed an Adversary Proceeding (#97-
10 6142-aer) naming multiple defendants (including Plaintiffs, and
11 Clibborn) to determine the extent and validity of certain liens on
12 Clibborn's homestead.

13 The parties to that adversary proceeding reached a settlement
14 following a settlement conference at which the Honorable Frank R.
15 Alley, III presided. The settlement agreement provided in pertinent
16 part that the balance (at least \$24,352.40) of the Clibborn home
17 proceeds (after other parties were paid) would be paid to
18 Plaintiffs. The settlement also provided that the Plaintiffs did
19 not waive their rights to proceed in these adversaries to determine
20 the dischargeability of their claims.

21 The trustee noticed the settlement on January 30, 1998. No
22 one objected; as such, the order approving it became self-executing.
23 The trustee then moved to dismiss Adversary Proceeding No. 97-6142,
24 with prejudice, based on the settlement. The settlement agreement
25 was attached to the Motion. On April 16, 1998, an order was entered
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1 dismissing that adversary. At some point, Plaintiffs were paid
2 \$25,153.70 from the proceeds of the Clibborn home.

3 On January 22, 1999, the trustee objected to Plaintiffs'
4 proof of claim, on the basis that it was "settled and paid in full
5 according to agreement." He recommended allowance as a general
6 unsecured claim for \$25,153.70. Plaintiffs did not request a
7 hearing on the objection, so the order thereon became self-
8 executing.

9 Discussion

10 Summary Judgment Standards:

11 On a motion for summary judgment, the moving party has the
12 burden to establish the absence of a material issue of fact for
13 trial. FRCP 56(c). With regard to its own claims or defenses,
14 (i.e. those elements for which the moving party bears the burden of
15 proof at trial)² the movant must support its motion with evidence-
16 using any of the materials specified in Rule 56(c)-that would

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18 ² As to the burden of proof regarding assertion of collateral
19 estoppel,

20 The party contending that an issue has been conclusively
21 litigated and determined in a prior action has the burden of
22 proving that contention. That party must place into evidence
sufficient portions of the prior record to enable the
bankruptcy court to decide if an issue was actually litigated.

23 Washington County Agency on Aging v. Goodrich (*In Re Goodrich*), Case
24 # 90-3571-S (Bankr. D. Or. May 22, 1991) (unpublished) (Sullivan,
J.) (internal citations omitted).

25 However, a party asserting an exception to the normal rules
26 of collateral estoppel has the burden of proof to prove the
exception. In Re Dutton, 1995 WL 759031 (Bankr D. Or. 1995) (not
reported in B.R.).

1 entitle it to a directed verdict if not controverted at trial.
2 Celotex Corporation v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2557,
3 91 L. Ed. 265 (1986) (Brennan, J) (dissent). There must be more than
4 a "scintilla", indeed the evidence must be "significantly
5 probative." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.
6 Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). The motion must in any
7 case meet the requirements of FRCP 56(c). In re Rogstad, 126 F.3d
8 1224 (9th Cir. 1997).

9 If the movant makes the requisite affirmative showing, the
10 burden of production shifts to the non-moving party to produce
11 evidentiary materials that demonstrate the existence of a "genuine
12 issue" for trial, or to submit an affidavit requesting additional
13 time for discovery. Celotex, supra at 2557 (Brennan dissent).
14 Conclusory arguments, unsupported by factual statements or evidence
15 do not meet this burden. In Re Lewis, 97 F.3d 1182 (9th Cir. 1996).
16 More specifically, conclusory, self-serving affidavits, lacking
17 detailed facts and any supporting evidence are insufficient to
18 create a genuine issue of material fact. FTC v. Publishing Clearing
19 House, Inc., 104 F.3d 1168 (9th Cir. 1996).

20 All inferences drawn from the underlying facts must be viewed
21 in the light most favorable to the nonmoving party. Simone v.
22 Manning, 930 F. Supp. 1434 (D. Or. 1996). When different ultimate
23 inferences can be reached summary judgment is not appropriate. Id.

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4 Preclusive Effect of State Court Judgment:

5 Plaintiffs seek a declaration that the state court judgment
6 is excepted from discharge under §§ 523(a)(2)(A) and (a)(6).³

7 § 523(a)(2)(A) Claim:

8 In order to establish a claim under §523(a)(2)(A) the
9 Plaintiffs must show that:

- 10 1. the Debtor made representations;
- 11 2. at the time he knew the representations were false, or
- 12 3. they were made with reckless disregard for their truth;
- 13 4. he made them with the intention and purpose of deceiving
- 14 the creditor;
- 15 5. the creditor justifiably relied on the representations;
- 16 and
- 17 5. the creditor sustained the alleged loss and damage as a
- 18 proximate result of the representations having been
- 19 made.

20 In Re Anastas, 94 F.3d 1280 (9th Cir. 1996).

21 Plaintiffs argue that all these elements were determined by
22 virtue of the state court judgment, and thus, under principles of

23 ³ Originally, Plaintiffs' First Claim for relief sought to have
24 the portions of the default judgment that had not been set aside,
25 excepted from discharge under §§ 523(a)(2)(A) and (a)(6).
26 Plaintiffs' Second Claim sought a judgment for \$250,000.00 in
punitive damages, for reasonable attorney fees in obtaining the
judgment, for interest from the date of the judgment, and for
attorney fees in the action as a whole, and that the judgment be
declared excepted from discharge under §§ 523(a)(2)(A) and (a)(6).

27 Since the Second Claim was filed, the state court has re-
28 entered a judgment for punitive damages, attorney fees and post
29 judgment interest, in the same document as the \$50,000.00 principal
30 as noted in the First Claim. As such, the Second Claim has merged
31 into the First.

1 collateral estoppel, defendants are precluded from contesting them
2 here.

3 Collateral estoppel (i.e. "issue preclusion") principles
4 apply in dischargeability proceedings under § 523. Grogan v.
5 Garner, 498 U.S. 279, 111 S. Ct. 654, 112 L. Ed. 2d 755 (1991).⁴ In
6 determining the preclusive effect of a state court judgment in a
7 subsequent federal suit (including dischargeability proceedings),
8 the court looks to the collateral estoppel law of the state that
9 rendered the judgment. In re Nourbakhsh, 67 F.3d 798 (9th Cir.
10 1995).

11 In Oregon, issue preclusion precludes relitigation of an
12 issue when that issue or fact has been determined by a valid and
13 final determination in a prior proceeding. McCall v. Dynic USA
14 Corp., 138 Or. App. 1, 906 P.2d 295 (1995). The requirements are:

- 15 1) the issue in the two proceedings is identical;
- 16 2) the issue was actually litigated and was essential to
the final decision on the merits in the prior
proceeding;
- 17 3) the party sought to be precluded had a full and fair
opportunity to be heard on that issue;
- 18 4) the party sought to be precluded was a party, or was in
privity with a party to the prior proceeding; and
- 19 5) the prior proceeding was the type of proceeding to which
the court will give preclusive effect.

20 Id.
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25 ⁴ By contrast, the doctrine of claim preclusion does not apply
26 in dischargeability litigation. Brown v. Felsen, 442 U.S. 127, 99
S.Ct. 2205, 60 L.Ed.2d 767 (1979).

1 Defendants ⁵ argue that they never "actually litigated" any of
2 the elements of fraud.

3 In Oregon, principles of collateral estoppel apply to default
4 judgments. Gwynn v. Wilhelm, 226 Or. 606, 360 P.2d 312 (1961).
5 Default judgments have the same "solemn character as judgments
6 entered after trial." Watson v. State, 71 Or. App. 734, 738, 694
7 P.2d 560, 562 (1985) rev. withdrawn 299 Or. 204, 701 P.2d 432
8 (1985). A default judgment establishes the truth of all material
9 factual allegations of the complaint. Rajneesh Foundation
10 International v. McGreer, 303 Or. 139, 734 P.2d 871 (1987); Fitch v.
11 Singleton, (In re Singleton), Case #96-6003-fra (Bankr. D. Or. Oct.
12 4, 1996) (unpublished) (Alley, J.). As such, this court concludes that
13 the elements of fraud were "actually litigated."⁶

14 Defendants also argue that they were denied a full and fair
15 opportunity to litigate the issue of fraud. Specifically, Clibborn
16 argues such denial was a result of the state court striking his
17 answer as a sanction for a discovery violation. He cites no
18 authority, however, which distinguishes this type of default from
19 the general doctrine that default judgments are entitled to
20 collateral estoppel effect. In Re Younie, 211 B.R. 367 (9th Cir.
21 BAP (Cal.) 1997), aff'd, 163 F.3d 609 (1998) (TABLE, TEXT IN

22
23 ⁵ Overholser's submissions for the most part address the merits
24 of the underlying fraud claims, which have already been reduced to
judgment.

25 ⁶ The only case going the other way on this issue is In Re
26 Hubbard, 167 B.R. 969 (Bankr. D. New Mex. 1994) a case out of New
Mexico applying Oregon law, and by which this Court is not bound.

1 WESTLAW) (under California law, a default is a default, no matter how
2 obtained).⁷

3 Given that the state court judgment has collateral estoppel
4 effect, it appears clear from both the state court's finding of
5 "fraud" as recited at the February 20, 1997 hearing and its award of
6 punitive damages, that the judgment is based, at least in part, on
7 Plaintiffs' common law fraud claim.⁸ In Oregon, common law fraud
8 essentially mimics the § 523(a)(2)(A) elements set out above. See,
9 Meade v. Cedarapids, Inc., 164 F.3d 1218 (9th Cir. 1999) (applying
10 Oregon law).

11 Accordingly, Plaintiffs' motions should be granted on their
12 § 523(a)(2)(A) claims, and the full amount of the judgment,
13 including the punitive damages and attorney fees award, is excepted
14 from discharge. Cohen v. De La Cruz, 523 U.S. 213, 118 S. Ct. 1212,
15 140 L. Ed.2d 341 (1998)) (all debt associated with fraud is
16 nondischargeable under § 523(a)(2)(A)).

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19 ⁷ Overholser has submitted a sworn statement that his attorney
20 told both he and Clibborn they did not have to appear at the
21 depositions. However, Overholser does not expressly argue, and
22 certainly cites no authority, that advice of one's own counsel is an
adequate ground to argue denial of a full and fair opportunity to
litigate.

23 ⁸ Punitive damages were not recoverable on the statutory
24 claims. See ORS 59.115(2)(a) and Foelker v. Kwake, 279 Or. 379, 568
P.2d 1369 (1977) (damages awarded in excess of those provided for in
ORS 59.115(2) is reversible error).

25 As attorney fees are not awardable for common law fraud, it
26 appears that the judgment was also based in part on the statutory
deceit claims. See ORS 59.115(10) providing for attorney fees to the
prevailing party in a statutory securities claim.

1 Likewise, Clibborn's first cross motion for summary judgment
2 should be denied on the issues of punitive damages and attorney fee
3 (as they relate to those awarded by the state court).⁹

4 § 523(a)(6) Claim:

5 In order to establish a claim under § 523(a)(6), the
6 plaintiffs must show that the defendants intended the injury itself,
7 not just the act that resulted in the injury. Kawaauhau v. Geiger,
8 523 U.S. 57, 118 S. Ct. 974, 140 L. Ed.2d 90 (1998). In addition,
9 the injury must be malicious, meaning that the conduct must be
10 without just cause or excuse. Sheble Aviation v. Sheble (In Re
11 Sheble), Adv. # RS98-1113-MJ/EP (Bankr. S.D. Cal. October 29,
12 1998) (unpublished letter opinion) (Perris, J.).¹⁰

13 Plaintiffs argue that the state court judgment, including the
14 award of punitive damages, is sufficient to meet the above
15 standards, as such, Defendants are precluded from contesting
16 Plaintiffs' § 523(a)(6) claims. As noted above, the default
17 judgment has collateral estoppel effect.

18 Regarding the punitive damages award, the 9th Circuit has
19 stated, "[u]nder Oregon Law, punitive damages are available when

20 ⁹ As distinguished by the attorney fees incurred in this action
21 which are not recoverable. See discussion infra.

22 ¹⁰ Judge Perris, recognizing the current split as to whether
23 Geiger subsumed the concept of malice into the concept of
24 willfulness, held that willful and malicious are two separate
25 requirements, that Geiger addressed the meaning of willfulness and
26 not of malice, and that Geiger did not disturb the formulation set
out in Tinker v. Colwell, 193 U.S. 473 (1904) that malice requires
that conduct be without just cause or excuse. Id. at f.n. #1.

1 there is evidence of malicious or wanton conduct." Central Office
2 Telephone, v. American Telephone and Telegraph Co., 108 F.3d 981,
3 993 (9th Cir. 1997) rev'd on other grounds, 524 U.S. 214, 118 S. Ct.
4 1956, 141 L. Ed. 2d 222 (1998) (internal citation omitted).¹¹ It
5 further noted "[t]he Oregon Supreme Court has sanctioned the award
6 of punitive damages whenever there was evidence of a wrongful act
7 done intentionally, with knowledge that it would cause harm to a
8 particular person or persons." Id. at 994, f.n. #17 (internal
9 quotation omitted).

10 Standing alone, it might be arguable whether the award of
11 punitive damages meets the Geiger standard. Here, however, the
12 state court complaint, at ¶ 18, alleged that both Clibborn and
13 Overholser's actions "were malicious, criminal in nature, and
14 calculated and done with the intention of taking plaintiffs' money
15 with no intention of honoring the security." This allegation is
16 deemed true in a default situation, Rajneesh Foundation
17 International, supra., and is sufficient, especially in light of the
18 award of punitive damages, to meet the § 523(a)(6) standard.

19 Attorney Fees For Litigating Dischargeability Issues:

20 Attorney fees for litigating the dischargeability issues at
21 bar are not recoverable. In Re Hashemi, 104 F.3d 1122 (9th Cir.
22 1997). On this issue, Plaintiffs' motions should be denied, and
23 Clibborn's cross motion, granted.

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25 ¹¹ Currently ORS 18.537 (effective 1995) imposes the standards
26 for an award of punitive damages. However, the state court suit was
commenced before ORS 18.537 became effective, so pre-adoption law is
applied. Howard, supra, at 140, f.n. #2, 935 P.2d at 434.

1 Effect of Claims Order:

2 In his second motion for summary judgment, Clibborn argues
3 the self-effectuating order disallowing the balance of Plaintiffs'
4 claim above \$25,153.70, renders the alleged debt satisfied, even if
5 nondischargeable. The Court construes this as a "mootness"
6 argument. If the underlying claim has been satisfied, its
7 dischargeability is irrelevant. The argument is disingenuous.

8 The trustee's claims objection was grounded on the fact that
9 the claim had been "settled and paid in full according to
10 agreement." It recommended allowance of \$25,153.70 as a general
11 unsecured claim. The self-effectuating order incorporates that
12 recommendation. A fair interpretation of the order would also
13 incorporate the basis for the recommendation, which was the
14 settlement "agreement" referenced therein and the order approving
15 that settlement. It is undisputed that, under the settlement
16 agreement, Plaintiffs' claims in these adversary proceedings would
17 not be prejudiced.

18 On the satisfaction/mootness issue, Clibborn's second motion
19 should be denied, (and Plaintiffs should be granted summary
20 judgment) with the exception that \$25,153.70 should be applied as a
21 credit against the balance due on the state court judgment.

22 **Conclusion**

23 There is no genuine issue of material fact. Plaintiffs are
24 entitled to judgment as a matter of law on the §§ 523(a)(2)(A) and
25 (a)(6) claims except as they relate to attorney fees for litigating
26 this case. Clibborn's motions should be denied except as they

1 relate to attorney fees for litigating this case and a \$25,153.70
2 credit against the state court judgment.

3 This opinion constitutes the Court's findings of fact and
4 conclusions of law under FRBP 7052. They shall not be separately
5 stated.

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7 ALBERT E. RADCLIFFE
8 Chief Bankruptcy Judge
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